

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chung v. Chung*,
2025 BCCA 136

Date: 20250430
Docket: CA48605

Between:

**Won Sok Chung, Don Won Apartments Limited, Don Won
Apartments (Haro) Limited, Crestview Manor Apartments Ltd.,
Chung Properties Ltd., and Won Holdings Ltd.**

Appellants/
Respondents on Cross Appeal
(Defendants)

And

Jae Hoon Chung

Respondent/
Appellant on Cross Appeal
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated
September 29, 2022 (*Chung v. Chung*, 2022 BCSC 1592,
Vancouver Docket S178422).

Counsel for the Appellants/Respondents
on Cross Appeal:

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Place and Date of Hearing:

Vancouver, British Columbia
March 17, 2025

Place and Date of Judgment:

Vancouver, British Columbia
April 30, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Justice Dickson
The Honourable Mr. Justice Butler

Summary:

This appeal involves a dispute between two brothers over the management of Vancouver properties they purchased as a joint investment. The properties were held by corporate trustees. A trial judge found that one of the brothers (Won Sok Chung), misappropriated funds from the corporate trustees' bank accounts for personal use. He used the money to purchase a residential property. To remedy the misappropriation, the judge ordered a 45% constructive trust against the residential property in favour of the second brother (Jae Hoon Chung). On appeal, it is alleged the judge erred in rendering the constructive trust subject to an accounting process that was established under a partial settlement agreement reached in relation to other issues. The judge is also said to have erred in dismissing a claim for punitive damages.

HELD: Appeal allowed. The term of the final order rendering the constructive trust subject to the accounting is set aside. Punitive damages are also awarded in the amount of \$100,000. Making the constructive trust "subject to" the outcome of the accounting cannot be logically reconciled with findings made about the scope and effect of the partial settlement agreement. On the second issue, a punitive damages award was rationally required given the respondent's reprehensible conduct as a fiduciary, including misappropriating over \$1.6 million from corporate trustee bank accounts, using it for personal gain, and then actively taking steps to conceal the wrongdoing.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:**Introduction**

[1] The main parties to this appeal are brothers. After a trial, a Supreme Court judge awarded one of the brothers (Jae Hoon Chung), a 45% constructive trust in residential property registered in the name of his sibling (Won Sok Chung).

[2] However, the judge attached a condition to the constructive trust. The brothers reached a partial settlement agreement before the trial began. The judge made the constructive trust subject to reduction if an accounting process established under the partial settlement agreement reveals that Jae has received prior payments specific to the principal, interest or any profits associated with the residential property. The judge also dismissed Jae's request for punitive damages.

[3] On appeal, Jae says each of these decisions reflects reversible error. He asks that we remove the condition from the constructive trust and award him punitive damages. Won argues there is no basis for appellate interference and the appeal should be dismissed.

Background

[4] The reasons for judgment at trial are indexed at 2022 BCSC 1592. The judge used the parties' first names to distinguish between them. I will do the same, intending no disrespect.

[5] Jae and Won are both real estate investors. Jae lives in Korea. Won lives in Vancouver. In 2006–2007, the brothers agreed to purchase two Vancouver apartment buildings as a joint investment. Jae's combined interest in the properties was just over 45%. Won held the remaining 55%. The properties were beneficially owned by the brothers but legally owned by corporations holding them as bare trustees. Won actively managed the investment properties and held the roles of president, sole director, and sole shareholder in the corporate trustees. Jae was the passive investor.

[6] The parties agreed that in exchange for actively managing the investment properties, Won would receive an annual 5% management fee based on gross rental income. Won was prohibited from withdrawing funds from the corporate trustees without Jae's consent and it was agreed that any income generated by the investment properties would be disbursed to the brothers in proportion to their interests.

[7] In November 2012, Won withdrew \$1,168,131.04 from one of the corporate trustees and deposited the money into his personal bank account. He did not seek Jae's consent or tell him about the withdrawal. In July 2013, Won withdrew \$496,755.20 from another of the corporate trustees and similarly deposited the money into his personal account. Once again, he did not seek Jae's consent or tell him about the withdrawal.

[8] In 2014, Won used the withdrawn money to purchase Guaranteed Investment Certificates (“GICs”). The GICs were then cashed and Won used the proceeds in 2014 to purchase a residential property on Marine Drive SW in Vancouver. Jae learned of the new property from his mother. He was unaware it had been purchased with funds withdrawn from the corporate trustees.

[9] Won was still living in the Marine Drive home at the time of trial.

[10] In 2017, Jae filed a lawsuit against Won, seeking damages for alleged improper loans from the corporate trustees, improper expenses, and overcharges in management fees. Jae also sought a remedy specific to the Marine Drive property. Won filed a counter-claim. Among other things, he sought reimbursement for fees associated with managing the investment properties.

[11] It was not until Jae filed his lawsuit that he learned his brother had used money from the corporate trustee accounts to purchase the Marine Drive property. In November 2020, Won amended his response to Jae’s lawsuit, acknowledging that \$1.6 million was transferred from one or more of the corporate trustees to bank accounts controlled by him, and was then used (along with other funds) to purchase the Marine Drive property and pay for related improvements and renovations.

[12] In September 2019, Jae and Won reached a partial settlement agreement in the lawsuit (the “Settlement Agreement”). The Settlement Agreement resolved Jae’s claims against Won for improper loans, expenses, and management fee overcharges. It also resolved Won’s counter-claim. The Settlement Agreement did not prevent Jae from carrying on with efforts to obtain a remedy specific to the Marine Drive property. It contained this term:

b. ...

Jae’s proposed disgorgement, tracing and constructive trust claims relating to the Marine Drive Property, and other alleged property, will continue (the “Disgorgement/Tracing Claim”).¹ Nothing in this agreement shall prevent Won from raising in the Disgorgement/Tracing Claim any matter of fact Won raised or could have raised in the Action and Counterclaim (without seeking any set-off in respect thereof).

[Emphasis added.]

The content of the footnote to the excerpted term read as follows:

The factual basis of which is set out in paragraphs 36, 37(a), 40 through 43 and 51 of the Statement of Facts of Jae's proposed Further Amended Notice of Civil Claim in the Action, appended to his Notice of Application filed August 19, 2019.

[13] The Settlement Agreement stipulated that Jae would be paid \$476,330 and there would be an "accounting" for "any additional amounts owing":

- a. Within 7 business days of this agreement being entered into, Won will cause the corporate trustees, Don Won Apartments Ltd. and Don Won (Haro) Apartments Ltd. (the "**Corporate Trustees**"), to pay a total of \$476,330 (CAD) to Jae's counsel, Fasken Martineau DuMoulin LLP in trust ... on Jae's behalf ... For certainty, Jae will be entitled to retain the \$476,330 regardless of the outcome of the Accounting.
- b. An accounting will be conducted to assess any additional amounts owing to Jae and/or Won, which will be conducted by an accountant to be selected by Jae, the cost to be split equally between the brothers up to a total of \$10,000 and any balance payable by Jae (the "**Accounting**").

[Emphasis in original.]

[14] Specific items were listed for consideration in the accounting, including: (a) amounts advanced to each of the corporate trustees by Jae and Won; (b) amounts paid by the corporate trustees to them; (c) expenses "improperly charged" to the corporate trustees and cash withdrawals made "without supporting documentation"; (d) repayments made to certain lines of credit; and (e) payments made "on account of Won's Korean debts". There was no mention of funds put towards the Marine Drive property.

Trial Judgment

[15] After executing the Settlement Agreement, the parties proceeded to trial on Jae's "Disgorgement/Tracing Claim".

[16] Won admitted that: (a) in 2012 and 2013, he arranged to refinance the joint investment properties, which generated mortgage proceeds; (b) he transferred the mortgage proceeds to his personal account, purchased GICs with those funds, later sold them, and then used the funds to purchase and renovate the Marine Drive

property; and (c) he did not tell Jae about the latter transactions until 2020, nor did he seek his consent: at para. 48.

[17] With these admissions, it was not “seriously contest[ed]” that Won breached his fiduciary duties under the trust agreements governing the corporate trustees, or that Jae was entitled to a remedy for the breach: at paras. 46, 49, 57.

[18] Won was “solely responsible for management of the [investment] properties” and was clearly the “directing mind” of the corporate trustees: at para. 47. The judge found his “failure to disclose his secret profit for years and the misinformation he provided when pressed by Jae did not ... meet the requisite standards for honesty and good faith”: at para. 52. Won’s “withdrawal of the money from the Corporate Trustees’ accounts for personal use, without disclosure or authorization from the beneficiary Jae, constituted a breach of both the ‘no conflict’ rule and the ‘no profit’ rule”: at para. 56. It also breached the express terms of the applicable trust agreements: at para. 56.

[19] To remedy the breach, Won sought a 45% constructive trust on the Marine Drive property. Won disputed the appropriateness of a constructive trust; however, he accepted that Jae’s “total share of the funds misappropriated from the Corporate Trustees for the purposes of purchasing the Marine Drive Property was \$750,673.83”: at para. 66. This sum represented 45% of the mortgage proceeds wrongfully converted by Won.

[20] The judge agreed that a constructive trust was the “appropriate and fair remedy”: at para. 68. He granted that order, “with no discount attributable to renovations undertaken by Won”: at para. 83. Won has not appealed from the constructive trust ruling.

[21] As of June 15, 2021, the Marine Drive property carried a market value of \$3.6 million, a “considerable rise in value from the original purchase price of \$1,682,306.13 (including tax) paid in 2014”: at para. 67. At trial, Won took the position Jae was entitled to “profits earned from the misappropriated funds” (in other

words, the increase in market value); however, he could not claim “for return of the principal”: at para. 88. This position was based on Won’s interpretation of the Settlement Agreement. He said the principal fell subject to the accounting process established under the Settlement Agreement and the \$476,330 paid out to Jae was “intended to be payments on account of the principal”: at para. 88. As such, to include the principal in the value of the constructive trust would result in double counting: at para. 88.

[22] The judge rejected this submission. He reviewed and interpreted the terms of the Settlement Agreement and concluded that:

[93] ... on a plain reading ... as a whole, the amounts implicated in the Disgorgement/Tracing Claim, including the principal, were clearly intended to be excluded from the Accounting.

[Emphasis added.]

[23] The judge gave five reasons for this conclusion. First, Jae’s Disgorgement/Tracing Claim was defined in the Settlement Agreement with specific reference to certain paragraphs in his Further Amended Notice of Civil Claim (“ANOCC”) that speak directly to the “principal and any profits arising from the purchase of ... Marine Drive”: at para. 95. For example, para. 37(a) of the ANOCC refers to “at least” \$1.6 million being diverted from the corporate trustees. Paragraphs 40–43 of the ANOCC allege this money was taken without Jae’s knowledge or consent, transferred to bank accounts controlled by Won, and then used to “make other investments and purchase real estate”, including the Marine Drive property.

[24] Second, the judge reasoned that had the parties intended the \$476,330 payment to be set off against amounts sought in the Disgorgement/Tracing Claim, they could have said so. Instead, the Settlement Agreement states the contrary: at para. 97.

[25] Third, the language of the Settlement Agreement establishing the scope of the accounting makes no reference to the Disgorgement/Tracing Claim: at para. 98. In other words, on the face of the Agreement, the subject matter of the Disgorgement/Tracing Claim was excluded.

[26] Fourth, the judge held that Won's interpretation of the Settlement Agreement "would render the agreed upon Accounting provisions redundant": at para. 99.

[27] Finally, Won's testimony that the \$476,330 payment under the Settlement Agreement was intended as a payment against the principal was "directly contradicted" by his evidence at examinations for discovery, where he said the payment had nothing to do with the Disgorgement/Tracing Claim: at para. 100.

[28] The judge concluded that the Settlement Agreement did not preclude Jae from seeking a remedy involving the principal for the Marine Drive property, as well as any profits or gains derived from that property: at para. 102.

[29] However, after making these findings, the judge went on to say:

[103] ... I am conscious of the concern raised by counsel for Won about the potential for double counting arising during the Accounting. The parties are agreed that any double counting would in principle be incorrect, and counsel for Won has undertaken not to pursue any amounts in the Accounting which are ordered to be paid or owed in this Disgorgement/Tracing Claim. For clarity during the Accounting process, I reiterate that this decision fully addresses any amounts owing arising from the Disgorgement/Tracing Claim (taking into account principal payments, profits and interest relating to the Marine Drive Property), and that such amounts should therefore not form part of any calculations made during the Accounting process.

[104] However, if Deloitte LLP were to determine in the Accounting that certain prior payments made by Won or the Corporate Trustees were in respect of principal payments, profits and interest relating to the Marine Drive Property, and not the matters referenced in s. 3b. [of the Settlement Agreement], in my view it is fair that Jae's interest in the Marine Drive Property, pursuant to the constructive trust, should be reduced by that amount to account for any prior reimbursement, and to avoid double counting.

[105] In reaching this conclusion, I note that there was insufficient evidence adduced at trial to enable me to resolve this accounting issue. In this regard, I note that both parties in their closing arguments presented conflicting alternative theoretical methods by which the \$476,000 settlement amount could be attributable either to the principal amount (Won's argument) or to

improper credit card charges, loans and management fees (Jae's argument). However, neither party presented the necessary evidentiary base, including the expert accounting evidence that would be required, to enable this issue to be resolved at trial.

[106] Further, I find that Won failed to prove at trial that he ever actually repaid the principal he alleges he did. Although Won represented that he paid approximately \$721,000 to the Corporate Trustees, he admitted on discovery that he used the funds to pay the \$476,333 to Jae and then immediately transferred the remainder of the funds back to himself. Thus, the evidence was insufficient at trial to determine whether, and to what extent, the misappropriated funds were ever repaid. Again, this is a matter that is best determined in the Accounting process. To the extent that the Accounting process fails to resolve this issue, and a dispute remains, I am content to remain seized for the limited purpose of resolving this remaining issue.

[Emphasis added.]

[30] The order entered after trial contains the following term, specific to the constructive trust:

- 2 The constructive trust is subject to a proportionate reduction if the accounting process agreed to by the parties determines that Won Sok Chung ("Won"), Don Won Apartments Ltd. or Don Won (Haro) Ltd. have made any prior payments to Jae in respect of the principal, interest and profit at issue in the Action.

[Emphasis added.]

[31] The judge next turned his attention to whether Won should be ordered to pay occupational rent in proportion to Jae's "share of the Marine Drive Property": at para. 107. He granted that order in the amount of \$128,314. This ruling is not at issue in the appeal.

[32] The final issue addressed by the judge was Jae's claim for punitive damages. The judge dismissed the claim, finding that Won's conduct "did not meet the threshold standard for 'high-handed, malicious, arbitrary, or highly reprehensible misconduct'": at para. 123. While the judge accepted that Won breached his fiduciary obligations and concealed the breaches from his brother, he also held that this behaviour had to:

[123] ... be understood in the family context in which it took place. It was Won who first identified the Properties as a business opportunity, and Won who managed all aspects of the business, while Jae remained merely a passive investor. Won made it clear in his testimony that he resented Jae's lack of contribution to the business, and also testified that he regularly made contributions of his own money to keep the business afloat, particularly in the early years. While this does not excuse the breach of trust, his prior intermingling of his own money with corporate money does at least provide an explanation as to why Won also felt comfortable withdrawing money from the corporate accounts, without consulting with Jae. Won also testified that he could have obtained financing for the purchase of the Marine Drive Property on his own but chose to use the GIC funds because they offered a favourable interest rate advantage (that accrued to both brothers). Thus this was not a situation involving theft, but merely convenience with respect to access to funds.

[33] The judge went on to note that Jae "has suffered no losses as a result of Won's actions". To the contrary, he has "profited handsomely from [the joint] investments." The Marine Drive property has increased in value by over \$2 million and Jae will also share in that increase in proportion to his investment. Thus, the judge was satisfied "the harm caused to Jae [was] minimal under the circumstances": at para. 124.

[34] Finally, the judge noted that as a result of his findings, "Won ha[d] already incurred a significant financial cost, which unto itself serves the function of retribution, deterrence and denunciation". The judge found it "would be excessive in [that] context to add a punitive damages award on top, which would run the risk of disproportionately compensating Jae": at para. 125.

Issues on Appeal

[35] Jae raises two issues on appeal.

[36] First, he says the judge erred in rendering the constructive trust subject to the potential for reduction emerging from the accounting process under the Settlement Agreement. Jae contends that this part of the judge's decision is irreconcilable with his interpretation of the Settlement Agreement, from which he concluded that Jae's claim to the Marine Drive property was excluded from consideration in the accounting process.

[37] Second, Jae says the decision to dismiss his claim for punitive damages is clearly wrong in light of the findings of fact made about Won's conduct, both at the time of misappropriating funds from the corporate trustees and subsequent to it. Those findings rationally required a punitive damages award.

Discussion

[38] Jae has persuaded me that both grounds of appeal necessitate appellate intervention. I will address each in turn.

A. Reducing the constructive trust through the accounting process

[39] The decision to allow for a potential reduction of the 45% constructive trust based on determinations made in the accounting process involved an exercise of discretion.

[40] Accordingly, a highly deferential standard of review applies. Jae says there is a principled basis on which to intervene. Among other things, in light of the judge's interpretation of the Settlement Agreement and his factual findings, this exercise of discretion was clearly wrong and permitting it to stand would result in an injustice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

[41] The respondent says the judge's discretion should be left intact. He puts it this way in his factum: the impugned term of the order appropriately balances "the intentions of the parties to set over the Accounting to an out of court process, while ensuring that Jae was not doubly compensated as a result of the Court's decision on the constructive trust claim".

[42] The respondent acknowledges there is one or more statements in the judge's reasons that could be read in support of the first ground of appeal. However, he says that on a fair reading of the reasons, as a whole, a more accurate view of things is that the judge accepted: (a) Jae may recover some or all of the principal put towards the Marine Drive property in the Disgorgement/Tracing Claim; (b) the parties

intended that the calculation and determination of that amount would be done through the accounting process; (c) the calculation of the value of the constructive trust must therefore also go through the accounting process; and (d) if the accounting is unable to resolve the issue, the parties are entitled to return to court for final resolution.

[43] From Won's perspective, this outcome makes good sense: it gives meaningful effect to the mutual intentions of the parties as expressed in the Settlement Agreement and avoids the "spectre of double recovery". It is also fair, allowing Won the opportunity to demonstrate the "true state of the balance sheet between the parties".

[44] I do not agree with this interpretation of the judgment.

[45] In my view, the judge made explicit and concrete findings that Jae's constructive trust claim over the Marine Drive property was to be resolved at trial, not as part of the accounting process under the Settlement Agreement. The accounting was reserved for the dispute over allegedly improper loans from the corporate trustees to Won, improper expenses claimed by him, and overcharges in management fees.

[46] The judge found Jae was entitled to 45% of the mortgage proceeds misappropriated from the corporate trustees and put towards the Marine Drive property, amounting to \$750,673.83: at para. 66. He found that as of June 2021 (two months before trial) the market value of the Marine Drive property was \$3,600,000, a "considerable rise in value" from the original purchase price of \$1,682,306.13: at para. 67. He awarded a 45% constructive trust with both values in mind and rejected Won's argument that the amount of Jae's entitlement should be reduced to account for money spent on renovating the property, which Won said would have increased its market value: at paras. 68, 83.

[47] After these determinations, the judge turned to the Settlement Agreement. Based on his interpretation of the Agreement, he found the parties agreed the trial would focus on “Jae’s disgorgement, tracing, and constructive trust claims relating to the Marine Drive property, and other alleged property”: at para. 85. Then, as noted, he concluded that “on a plain reading” of the Settlement Agreement, the “amounts implicated in the Disgorgement/Tracing Claim, including the principal, were clearly intended to be excluded from the Accounting”: at para. 93, emphasis added.

[48] The judge’s stated reasons for this conclusion included his determination that the Settlement Agreement’s reference to specific paragraphs of the ANOCC in defining the scope of the Disgorgement/Tracing Claim was “clearly ... intended to clarify that both the original payments [towards the Marine Drive property] and any profit were intended to be included” in the claim: at para. 96, emphasis added. The judge also noted that the Settlement Agreement’s list of items to be addressed by the accounting made no mention of the Disgorgement/Tracing Claim. He found this was:

[98] ... consistent with the conclusion that the scope of the Accounting was intended to relate solely to the matters set out in s. 3(b) [of the Settlement Agreement], including Jae’s claims against Won for improper loans and expenses and management fee overcharges, and Won’s counterclaim for expenses, a finder’s fee and various management fees, and not the Disgorgement/Tracing Claim referenced in s. 1(b) ...

[Emphasis added.]

[49] At trial, Won argued that the \$476,330 paid to Jae under the Settlement Agreement was a payment against his \$750,673.83 share of the mortgage proceeds used to purchase the Marine Drive property (the principal). The judge rejected that argument and found there was nothing about the Settlement Agreement that precluded Jae from seeking “both the principal and any profits or gains related to the Marine Drive Property” in the trial: at para. 102. He also found that Won “failed to prove at trial” that he repaid any of the principal to the corporate trustees: at para. 106.

[50] As the judge himself appeared to recognize at para. 103 of his reasons, these findings—in their cumulative effect—resulted in the trial judgment “fully address[ing]” any amounts owing under the Disgorgement/Tracing Claim: at para. 103. In this same paragraph, the judge stated that “such amounts should therefore not form part of any calculations made during the Accounting process”.

[51] I agree with Jae that in light of the judge’s interpretation of the Settlement Agreement and his factual findings, the term of the final order rendering the 45% constructive trust subject to the accounting is logically indefensible. I appreciate the concern over possible double-counting and the judge’s attempt to ensure that final resolution of the dispute between the parties is fair. However, he made explicit findings that separated the accounting process from Jae’s claim against the principal and profits associated with the Marine Drive property. Those findings must be respected. Otherwise, as aptly argued by Jae, the trial outcome does not respect the parties’ intention underlying the Settlement Agreement, as interpreted by the judge, and Won will have a second opportunity to argue that he has already repaid the whole or part of the principal, even though he failed to do so at trial.

[52] For these reasons, I would accede to the first ground of appeal and remove the “subject to” from the final order (term 2).

B. Declining punitive damages

[53] The standard of review for punitive damages is rationality: *Yates v. Langley Motor Sport Centre Ltd.*, 2022 BCCA 398 at para. 67, citing *Chhina v. Rebecca L. Darnell Law Corporation*, 2021 BCCA 430 at paras. 40–41. Consequently, appellate courts “have a much greater scope and discretion on appeal” in addressing these awards than would otherwise be the case: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 197, 1995 CanLII 59.

[54] In assessing whether interference is warranted, the appeal court must ask itself: “was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?”: *Hill* at para. 197. If the answer is

“no”, that is the end of the matter and the decision to decline punitive damages must be respected.

[55] It is important to understand that punitive damages “bear no relation to what the plaintiff should receive by way of compensation”: *Hill* at para. 196, emphasis added. Instead, they “are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner”: *Hill* at para. 196. At the same time, punitive damages “should only be awarded in ... circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence”: *Hill* at para. 196. Consequently, “[c]ourts have maintained a high bar for when punitive damages would be a rational response to defendants’ conduct”: *Yates* at para. 68.

[56] Jae says this case called out for punitive damages. Won managed the investment properties as a fiduciary. He breached his fiduciary duties for the sole purpose of advancing his own interests. The breaches were wilful and Won actively concealed his wrongdoing for a protracted period, even in the face of Jae’s demands for transparency. From Jae’s perspective, Won’s conduct was reprehensible, and as stated in his factum, “amounted to a flagrant and marked departure of the standards expected of a fiduciary and trustee”. He says the judge’s findings about Won lead to the “inescapable” conclusion that punitive damages were a “natural and rational” response to the case. The constructive trust and occupational rent were inadequate to “serve the functions of retribution, deterrence and denunciation”. On appeal, Jae seeks a punitive damages award of between \$150,000 to \$200,000.

[57] In response, Won says the judge correctly instructed himself on the relevant legal principles, considered all appropriate factors in the particular context of the case, and found there was no rational basis for an award of this nature. He was best positioned to make that call. He provided considered reasons for rejecting Jae’s claim, including the familial context in which it arose and the fact that Jae suffered “no losses” from his brother’s conduct. To the contrary, Jae has “profited very handsomely” from the two investment properties, which sold in 2021 for a

combined capital gain of approximately \$11.8 million. Jae will also receive a proportionate share of the increased value of the Marine Drive property. In the judge's view, the "harm caused to Jae [has been] minimal": at para. 124.

[58] Won says there is no principled basis on which to interfere with the judge's discretion. In fact, he argues doing so would create an unworkable precedent; he says acceding to Jae's position will mean that "*any* breach of fiduciary duty [will] attract punitive damages, regardless of the context of that breach, at least presumptively" (*factum*, italics in original).

[59] I disagree. It is incontrovertible that punitive damages are assessed case-by-case and always informed by the context and the particulars underlying the impugned conduct: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 71, 95. In advancing this ground of appeal, Jae has not asked the Court to adopt a presumption in favour of punitive damages where the misconduct includes fiduciary breaches. He simply says that given the judge's factual findings in this case, including breaches of fiduciary duty (an aggravating circumstance), the misconduct was "so outrageous that punitive damages were rationally required to act as deterrence" (*Hill* at para. 197), and the judge erred in concluding otherwise.

[60] I agree.

[61] The judge found that Won breached his fiduciary duties of loyalty and trust by misappropriating over \$1.6 million from the corporate trustees: at paras. 46, 49, 58. He also breached the explicit terms of the applicable trust agreements: at para. 56. He acted in the face of a conflict, preferred a personal interest, and took a secret profit: at para. 52. He then failed to disclose that profit "for years" and when pressed for disclosure by Jae, who depended on him for financial transparency, he responded with "misinformation" that did not "meet the requisite standards for honesty and good faith": at para. 52.

[62] There are a number of factors specific to this case that make Won’s conduct reprehensible, individually assessed. The judge found he took “active steps to conceal from Jae for years that Jae even had an interest in the property”: at para. 111, emphasis added. For example, the transfers of mortgage proceeds from the corporate trustees to Won’s personal bank account were not reflected in income statements provided to Jae, which “were the only form of financial report prepared and presented by Won and the Corporate Trustees”: at paras. 18, 24. In November 2016, after Jae had made multiple requests for financial disclosure specific to the investment properties, Won sent him an email offering to purchase his beneficial interest in the properties without disclosing or accounting for the fact that he had removed \$1.6 million from the corporate trustees for his personal use: at para. 35. Jae resisted the offer and continued to demand disclosure. Won “continued to refuse”: at para. 36.

[63] Eventually, Jae retained legal counsel who wrote to Won setting out his brother’s concerns. It was only then that Won admitted he had taken money from the corporate trustees. However, even then he did not acknowledge the funds were used to purchase the Marine Drive property, and importantly, he told Jae that some of the money had been spent on repairs and maintenance for the investment properties and the remainder was held in a savings account: at para. 37. This was not true: at para. 38. In a petition filed before Jae’s lawsuit seeking partition and sale of the investment properties, Won swore an affidavit deposing that he had not improperly diverted funds: at para. 39. At trial, he admitted the contrary.

[64] I appreciate the courts have “maintained a high bar” for awarding punitive damages: *Yates* at para. 68. However, I do not see how Won’s conduct—as determined by the judge—can reasonably be described as anything other than egregious and a marked departure from the ordinary standards of decent behaviour: *Whiten* at para. 36. Moreover, the individualized circumstances of this case are not such that a punitive damages award will have the effect of creating a presumption in favour of damages each time there is a breach of fiduciary duty. This case involved

more than one breach, concerted efforts to conceal the wrongdoing over a protracted period, deception and deliberate falsehoods.

[65] The judge considered the familial relationship to be attenuating. In my view it has the opposite effect, heightening the seriousness of the breach of trust. The judge found there was an explanatory context for Won's breach of duties, namely, that some of his own money was intermingled with corporate funds and he "felt comfortable withdrawing money from the corporate accounts, without consulting Jae": at para. 123. Won's subjective belief in justification does not negate the fact of the breaches or their palpable wrongfulness. Whatever the perceived justification for withdrawal may have been, the fact is that Won was prohibited from the kind of withdrawals made here without Jae's consent. Not only did he fail to obtain that consent, he knowingly and actively concealed the withdrawals for a long time, and lied about them.

[66] Respectfully, the judge's analysis of the special damages claim was flawed in a number of ways. He described Won's actions as something other than "theft": at para. 123. However, Won's conduct clearly involved a wrongful conversion of corporate funds for personal use. Functionally, these behaviours amount to the same thing. The judge found it "significant" that Jae suffered "no losses" from Won's actions: at para. 124. This factor received too much weight. On the record in this case, it appears that but for Jae's concerted efforts at getting at the truth of the matter, Won's misconduct would have persisted and may never have been detected. Moreover, the profits to which Jae is now entitled were largely driven by increases in property value, something not within the control of Won or the product of his skill. In my view, the amount of weight attributed to the fact that Jae will profit through the compensatory awards ultimately overshadowed the fact that punitive damages are intended to punish the defendant for their conduct even where the plaintiff is made whole through compensation. As made clear in *Whiten*, punitive damages are "directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss": at para. 92.

[67] Finally, the judge found that because of the constructive trust and the occupational rent, Won has “already incurred a significant financial cost, which unto itself serves the function of retribution, deterrence and denunciation”: at para. 125. Respectfully, this conclusion overlooks the fact that the constructive trust and occupational rent are compensatory and do no more than provide Jae with what he is legally entitled to based on the joint investment agreement, his proportionate share in related profits, and Won’s occupation of the Marine Drive property. They do nothing to address the additional features of the case: the means by which Won withdrew funds he was not entitled to in breach of his duties, used them for personal gain, and importantly, actively concealed the fact that he did so, including by providing misinformation. This is the conduct that requires a response by way of a punitive damages award.

[68] In my view, to not award punitive damages in this case sends the wrong message, namely, that breaching fiduciary duties and actively concealing those breaches to the detriment of the people who rely upon the fiduciary will not carry punitive consequences. Instead, at best, the fiduciary will be forced to restore the impacted parties to their original position. Contrary to the judge’s view, I do not see how that message deters and denounces. Instead, it does what the Supreme Court of Canada warned against in *Whiten*: the “compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others”: at paras. 72, 124.

[69] The cases relied upon by Won are distinguishable. He says punitive damages were not awarded in those cases and it shows the judge rationally exercised his discretion here.

[70] In *Zhong v. Alan Hu Personal Real Estate Corporation*, 2025 BCSC 40, the defendant realtor led the plaintiff client to believe he was working to help him purchase a residential property, while at the same time working on an agreement to make the purchase himself and successfully outbidding the plaintiff: at para. 116. The fiduciary relationship in *Zhong* was not as lengthy as the one in this case.

Further, the damages award in *Zhong* provided compensation for the plaintiff's loss of an opportunity taken from them—it did not merely return funds the plaintiff had always been legally entitled to, as was the case here: at para. 117. Nor did the breach in *Zhong* include misappropriating over \$1.6 million dollars for personal gain in contravention of explicit terms of trust agreements intended to safeguard the parties' investments, and then actively concealing the wrongdoing through non-disclosure and misleading responses to financial inquiries.

[71] Won also cites *Shen v. West Continent Development Inc.*, 2020 BCSC 5, another case dismissing a claim for punitive damages. In *Shen*, the defendant held a power of attorney, which was found to create a fiduciary relationship: at para. 92. The purpose of the power of attorney was to allow him to act as the plaintiffs' agent in paying sub-contractors and suppliers for construction work: at paras. 31, 85. Using that authority, the defendant removed \$220,041.83 from the plaintiffs' accounts and could not account for the withdrawal: at paras. 69, 95. The judge found the defendant's conduct was "largely the product of poor judgment and opportunism": at para. 142. The amount at issue in *Shen* was significantly less than this case; there was no finding that the defendant misappropriated funds for personal gain; and there were no findings of concerted, active concealment in the face of demands for disclosure.

[72] Finally, Won cites *Chohan v. Chohan*, 2024 BCSC 420. The claim for punitive damages in that case arose in the context of an oppression proceeding (qualitatively different from the case at bar), and the judge found that the oppressing parties "did not profit from their actions, either at the expense of the aggrieved shareholder or the corporation itself": at para. 156. Moreover, the claimant's conduct "contributed to the brewing dispute" which ultimately resulted in litigation: at para. 150. No such finding was made here.

[73] The cases cited by Won are distinguishable on their facts. Here, the judge made several findings of fact that in their cumulative effect rationally required an award for punitive damages. Won's misconduct persisted over a lengthy period

(three to four years) and in those circumstances, the “need for denunciation is aggravated”: *Whiten* at para. 112. I am of the view an award of \$100,000 would be fair and just. When that amount is added to the compensatory damages, the total sum is not so inordinately large that it exceeds what is rationally needed to achieve a punitive effect: *Whiten* at para. 71.

Disposition

[74] For these reasons, I would allow the appeal, set aside term 2 of the final order, and award Jae \$100,000 in punitive damages. All other aspects of the final order should remain intact.

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Dickson”

I AGREE:

“The Honourable Mr. Justice Butler”